

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant suffered a compensable injury to his right shoulder on April 15, 2006. He reported the injury and received medical treatment which included surgery with Dr. Stechschulte on May 24, 2006. Claimant was off work 10 to 12 days post surgery and when he returned to work he was given accommodated work of answering the phone and the opportunity to take up to 6 breaks during the day.¹ Claimant was also given work facing shelves which claimant did with his left arm only.² According to claimant some of this work was above the shoulder and it also required him to stand, bend and walk the store. Claimant stated that he did the best he could using only his left arm.

The issue that was presented to the ALJ was whether claimant's present complaints of left shoulder pain, along with the uncontroverted opinion that he requires treatment for those complaints, is a natural and probable result of his underlying accident of April 15, 2006 or is otherwise causally related to a preexisting condition. As noted by the ALJ, it is a well settled principle that where a separate injury occurs as a direct and natural consequence of a work injury, the separate injury is considered compensable as part of the original work injury.³ But if the need for treatment is due to his preexisting condition, one that did not arise out of or in the course of his employment, he is not entitled to compensation for that condition.⁴

The ALJ concluded that "[t]he record as a whole . . . did not show such a direct correlation between the right shoulder injury and the left shoulder complaints."⁵ He went on to explain:

The claimant had left shoulder trouble from at least a couple of year [sic] prior to the work injury. MRI's from 2004 and 2007 were essentially the same, an arthritic left shoulder with possible rotator cuff tear. There were medical records in the time period where the claimant alleged he hurt his left shoulder on light duty, and the records do not reflect any such report of injury, or for that matter, any complaints regarding the left shoulder. The left shoulder and its relationship to the light duty work did not surface in medical reports until about eight months after the claimant

¹ P.H. Trans. at 8.

² *Id.* at 9.

³ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 201, 547 P.2d 751 (1976).

⁴ K.S.A. 44-501.

⁵ ALJ Order (July 24, 2008) at 2.

last worked for the respondent. Furthermore, the claimant was not, at least according to Dr. Stechschulte's restrictions, working one-armed duty the whole time he was on light duty. He was allowed to lift up to 5 pounds with the right arm as of August 17, 2006, and the light duty position did not appear to involve any lifting above that limit. Also, the light duty work would have involved some use of the left arm even if the claimant's right arm use was unrestricted. And finally, there was testimony that it may have been other non-work activities that bothered the claimant's left shoulder.⁶

The ALJ ultimately concluded that although claimant's light duty activities "may certainly have caused increased pain in the already damaged left shoulder", it is not "the reason" the claimant faces arthroscopic shoulder surgery.⁷ Thus, he denied the requested medical treatment.

This Board Member has considered the evidence and concludes the ALJ's Order should be reversed and the medical treatment should be provided. It is a longstanding rule that every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is compensable under the Workers Compensation Act. In *Jackson*⁸, the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

Any doubts as to the viability of this rule have been put to rest based upon the Kansas Supreme Court's recent opinion in *Casco*⁹. The secondary injury rule allows an injured employee to receive compensation for *all of the natural consequences arising out of an injury, including any new and distinct injury that is a direct and natural result of the primary injury*.¹⁰

Claimant was seen by Dr. Edward Prostic at his attorney's request. Dr. Prostic recommended subacromial decompression and excision of the lateral clavicle. He attributed all of claimant's left shoulder complaints to the right shoulder injury.

⁶ *Id.* at 2.

⁷ *Id.* at 3.

⁸ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, reh. denied (May 8, 2007).

¹⁰ *Id.* at 515. Emphasis added.

At respondent's request, Dr. Lowry Jones examined claimant in August 2007 and he concluded that claimant's work activities likely aggravated his pain complaints in the left shoulder, but were not the primary reason for the claimant's continued left shoulder symptoms.¹¹ He diagnosed chronic impingement, chronic acromioclavicular joint arthritis and a possible rotator cuff tear, all of which he believed were present before the 2006 injury. And like Dr. Prostic, he recommended surgery to address claimant's complaints.

The ALJ indicated that Dr. Prostic's examination in May 2007 was the first mention of left shoulder pain. But this appears not to be the case. Claimant was seen by Dr. Eden Wheeler in March 2007 at respondent's request.¹² In Dr. Wheeler's records, she references claimant's post-surgery modified work activities and that claimant says "he again used only his left hand and that he 'hurt the left shoulder'".¹³ Although respondent argues that this reference fails to attribute the source of his pain to work activities, this Board Member disagrees. Taken as a whole, it appears that the modified work activities, using the left arm only, is the source of the increased symptoms in the left shoulder rather than some activities that might have occurred at home.

When all this evidence is considered, this Board Member finds that claimant has met his burden of proof. Although he clearly had some preexisting disease process in his left shoulder, claimant's one handed work while recovering from his right shoulder surgery has led to an increase in his symptoms and now, the need for surgery. There is no indication that prior to April 15, 2006 claimant was told of his need for surgery or that the progression of his condition was unrelated to his underlying right shoulder injury. To the contrary, Dr. Jones has indicated that his work activities aggravated that condition. He is therefore entitled to medical treatment. The ALJ's Order is, therefore, reversed and respondent is directed to provide claimant with medical treatment. A list of 3 orthopaedic physicians shall be provided to claimant and claimant may select one from that list to direct his care.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁴ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

¹¹ P.H. Trans., Cl. Ex. 3 at 2 (Dr. Jones' August 13, 2007 Report).

¹² This report was identified at the preliminary hearing but not admitted into evidence. Nonetheless, both parties have referenced it (respondent doing so first in its brief) and claimant has indicated that he has no objection to it being included in the record on appeal).

¹³ Claimant's Reply Brief at 3 (filed Sept. 18, 2008) (Dr. Wheeler's Mar. 29, 2007 IME Report).

¹⁴ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated July 24, 2008, is reversed. Claimant is entitled to medical treatment and respondent is directed to provide a list of three orthopaedic specialists from which claimant can select one to direct his care.

IT IS SO ORDERED.

Dated this _____ day of October 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge